No. 3722

United States

Circuit Court of Appeals

For the Ninth Circuit

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Defendant in Error

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By..... .....

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STATEMENT OF FACTS.

The evidence as contained in the Transcript discloses that Plaintiff in Error, at the time of his arrest and the seizure of intoxicating liquors, was conducting a soft drink parlor designated as "Alpine Winery."

That the premises occupied by defendant at that

time, consisted of a barroom, diningroom and kitchen, all on one floor.

On December 29th, 1920, Prohibition officers entered upon the premises through the back door which brought them into the kitchen; the diningroom and barroom being connected with the kitchen. The plaintiff in error, when the officers entered, was standing on a table in the kitchen putting a curtain on the window. The demijohn containing the substance described as jackass brandy and the bottle containing the wine, were under the table in the kitchen. (Tr. Page 66).

It appears without contradiction that at the time the officers entered the premises, they had definite information that Plaintiff in Error was selling intoxicating liquors from the kitchen of said premises.

It is admitted that the premises described as the Alpine Winery was a public place and therefore an implied invitation to enter was extended to the public. There is no contention and no testimony was introduced to establish that Vachina was occupying any part of the premises as his home, or that any part of said premises were being occupied by any one for any other purpose than business.

The statement is, we believe, warranted from the evidence adduced, that no search was made of the premises and that the liquor seized was in plain sight underneath the table in the kitchen.

PLAINTIFF IN ERROR'S CONTENTION.

What might be stated to be the basic error relied upon by Plaintiff in Error is:

(a) **That the affidavit for the issuance of the**

search warrant is insufficient because of the failure to state therein, facts sufficient to establish probable cause and that by reason thereof the search warrant was void.

In attempting to take advantage of this alleged error, there was filed a motion to quash the search warrant before the United States Commissioner who issued the same, which motion was by the said Commissioner denied.

(b) **The action of the United States Commissioner in denying the motion to quash the search warrant was attempted to be reviewed in the District Court and the refusal of the District Court to entertain the Motion is alleged as error.**

(c) **Thereafter a motion to quash the search warrant issued by the United States Commissioner was filed in the District Court after the Indictment was returned, and it is alleged that the Court erred in denying said motion.**

(d) **The insufficiency of the affidavit for the issuance of a search warrant was again attacked by objections interposed to the testimony of witnesses Nash and Brown upon the trial of the case.**

(e) **That the search warrant was illegal.**

GOVERNMENT'S CONTENTION.

Taking up the points urged by Plaintiff in Error in the order in which they are presented, we respectfully maintain that:

(1) **The affidavit upon which the search warrant issued, was sufficient.**

(2) **That under the facts as shown by the testi-**

mony, no search warrant was required.

In order for plaintiff in error to be successful in obtaining a reversal of this case, it is necessary that it be established to the Court's satisfaction that the affidavit for the search warrant was insufficient and also that, under the facts, a seizure was not authorized without a warrant. This, of necessity, is the alleged primary right invaded and from it flows the other alleged errors relied upon.

If the affidavit for search warrant was sufficient, or, if a seizure could be lawfully made without a warrant, the case of plaintiff in error collapses and the points urged under the other assignments or error need not be determined.

The particular portion of the affidavit for search warrant that is urged as being insufficient to warrant a finding of the probable cause, reads as follows:

> "That the fact, circumstances and conditions of which affiant has knowledge and as ascertained by affiant are as follows, to-wit: Direct information by a certain citizen of Reno whom affiant has known for several years and who he considers absolutely credible and reliable, but whose name cannot be stated in this affidavit: That on the 24th day of December, 1920, said informant and friend purchased alcoholic liquors from the proprietor of said Alpine Winery; said liquor being served and sold from the back room (kitchen of said soft-drink establishment); said information was given to affiant under oath."

It is disclosed from this statement that the party giving the information to the prohibition officer was first placed under oath. It further appears from the

affidavit that the informant was known to the prohibition officer for a number of years and was considered absolutely credible and reliable.

The Commissioner, when these facts were presented to her, was thereby advised of affiant's estimation of the credibility of the party giving the information. The source of affiant's information is disclosed and the facts are stated, to-wit:

> "That on the 24th day of December, 1920, informant and a friend purchased liquor from the proprietor of the Alpine Winery and that the liquor was served and sold from the back room (kitchen)."

It will be noted therefore:

(a) **That the party making the affidavit stated the facts which would tend to establish the credibility of the informant.**

(b) **There is not stated conclusions, but facts.**

(c) **That an oath was administered to the informant prior to a statement of the facts.**

We submit that these facts meet the requirements of the constitutional provision and establish probable cause.

Many cases are cited by council in support of his theory that the affidavit for a search warrant is insufficient, but we insist that he has failed to cite any case holding that the facts of the same completeness and fullness as that set out in the instant case are insufficient.

A reading of the decisions cited by counsel afford no assistance in the determination of the validity of the affidavit in this case, for the reason that in a

great number of these cases the Court simply passed upon the sufficiency of an affidavit that contained the mere recital, "That affiant is informed and believes, or, "That affiant has good reason to believe," etc. The decisions in that respect are undoubtedly good law, but it is to be observed that in all of these cases the source of the information was not divulged nor is there stated therein the information received.

In the case of the United States vs. Friedberg, 233 Fed. 313, cited by counsel, the point determined by the Court was that under a search warrant authorizing the search of premises located at 234 North Third Street, and commanding the seizure of "Leaf tobacco, the ingredients thereof, and utensils used in the manufacturing of same," a search of defendant's private residence at No. 1516 Moyanensing Avenue and the seizure of the private books and papers was not authorized. In other words, it was very properly held by the Court that a search warrant authorizing the search of certain premises for leaf tobacco, did not permit the seizure of private papers at premises other than those described in the warrant. It is very plain, therefore, that this case is not in point.

United States vs. Veeder, 255 Federal 414, is cited. The affidavit for search warrant in this case recited, "That affiant has good reason to believe and does verily believe," etc. The source of affiant's information or the facts upon which he based his belief were not recited in the affidavit. In passing upon this affidavit, the Circuit Court of Appeals of the Seventh Circuit said:

"Applying these principles to McIsaac's affi-

davit, we observe that not a single statement of fact is verified by his oath. All he swears to is that, 'He has good reason to believe and does verily believe so and so; he does not swear that so and so are true, he does not say why he believes. **He gives no facts or circumstances to which the Judge could apply the legal standard and decide that there was a probable cause for affiant's belief.** There is nothing but affiant's application of his own undisclosed notion of the law to an undisclosed side of facts and in our system of government the accuser is not permitted to be also the defendant."

This case is readily distinguishable from the instance case in many respects. The court in the case cited held the affidavit to be deficient for the following reasons:

(1) **That he does not swear as to the truth of any fact:**

(2) **He does not say why he believes.**

(3) **He gives no facts or circumstances to which the Judge could apply the legal standard and decide that there was a probable cause for affiant's belief.**

(4) **There was simply his undisclosed notion of the law to an undisclosed state of facts; none of these deficiencies exists in the case now before the court for consideration.**

We submit that the commissioner was fully and sufficiently apprised of a condition existing upon the premises desired to be searched, sufficient at least for her to apply the legal standard and decide whether or not there was probable cause of believing that defendant had in his possession intoxicating liquor.

In the case of in Re Tri-State Coal and Coke Company, cited by Plaintiff in Error, the Court held that seizure of articles not described in the search warrant was unlawful. It was further decided by the Court in that case that the affidavit for a search warrant was defective because, "It does not even set forth the person who committed the alleged felonies, does not sufficiently designate and describe the property to be seized, does not show how the books and papers were used, as the means of committing a felony."

The Weeks case, 232 United States, 383, we respectfully submit did not involve the sufficiency of an affidavit for search warrant. A reading of this case will disclose that no search warrant was issued.

United States vs. Baumert, 179 Federal, Page 735; the District Court holds that an information filed by the District Attorney must be supported by an affidavit based upon positive knowledge. It was further announced by the Court in its decision that it was not necessary for the party having knowledge of the facts to come before the commissioner and testify but an affidavit made before a person duly qualified to administer oaths was sufficient compliance with the law.

In the instant case, while the record is silent as to whether or not the statement made to affiant was filed with the commissioner, it does affirmatively appear that the party giving the information was first sworn to tell the truth. If the rule of law announced in this case is correct, we submit it is not necessary that the party be brought before a Commissioner. It is sufficient if the statements he makes are made under the sanctity of an oath.

The Plaintiff in Error, in his brief, quotes at length from the case No. 12,126, Federal Cases:

It will be noted that one of the vices complained of by the District Judge was the fact that warrants are issued based upon information and that the party making the affidavit states he has reason to believe and does believe that the person charged has committed the offense.

In the instant case, it cannot be said that the same vice appears from the reading of the affidavit, for, as we have already stated, the party making the affidavit sets forth the information he received. Therefore, the affiant does not state his conclusion to the commissioner but states rather, the ultimate facts and the commissioner is then permitted to form his own conclusion from these facts as to the existance of probable cause.

Section 25, Title II of the National Prohibition Law, provides that a search warrant may issue as provided in Title Eleven of Public Law No. 24, 65 Congress, approved June 15,1917. This is the authority for issuing search warrants under the National Prohibition Law. This act is also described as the Act of June 15, 1917, 40 Statutes at Large, 228.

Section 3 of 40 Statutes at Large 228, provides:

> A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

That the provisions of a search warrant contemplate the issuance of the search warrant upon in-

formation and belief, is fully sustained by Section 10 which provides:

> The Judge, or commissioner, must insert a direction in the warrant that it be served in the day time unless the affidavits are **positive** that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

The District Court of New York in the case of in Re Rosenwasser Brothers, 254 Fed. 171 had before it for decision whether facts stated in an affidavit were sufficient to warrant a finding of probable cause. The Court stated:

> Probable cause must be shown from the facts alleged. It is not sufficient to aver nothing beyond the belief of an individual that such facts could be set forth. The conclusion from the averments of facts must be that of the magistrate, and not upon the opinion of the affiant. United States vs. Tureaud (C. C.) 20 Fed. 621; United States vs. Baumert (D. C.) 179 Fed. 735, and cases therein cited.
>
> But the averments of facts need not be by an eyewitness. Allegations on information can be stated, if the facts so referred to and the source of the information are stated. The expression of belief in those facts is customary and required, but does not of itself constitute an allegation which will take the place of the statement of the alleged facts themselves. Beavers vs. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.
>
> But the evidence need not be given in detail, nor need the allegations be made by all the parties who will be called to prove them at the hearing. A direct affidavit that facts exist from which prob-

able cause is inferable is sufficient. So is a statement that information as to the facts has been obtained from named sources, if the facts are recited. Beavers vs. Henkel, Supra, 194 U. S. at page 86, 24 Sup. Ct 605, 48 L. Ed. 882.

The Supreme Court of the United States in the case of Beavers vs. Henkel, 194 U. S. at page 73; 48 Law Edition, page 882, announced a principle of law which we feel should materially assist the Court in deciding the issue here presented. While this case is cited by plaintiff in error, we believe that the holding in that case fully sustains the position of the Government. The case involves the sufficiency of a complaint on information and belief in a removal proceeding, but as in the instant case, there was a full disclosure set out in the said affidavit of the character of the information received from the informant by the affiant. We feel that the decision in this case by the Supreme Court of the United States is of such importance that a quotation from it is warranted. The Court, in passing upon this question,, stated.

" 'It is further contended that there was no jurisdiction to apprehend the accused, because the complaint on removal was jurisdictionally defective, in that it was made entirely upon information, without alleging a sufficient or competent source of the affiant's information, and ground for his belief, and without assigning any reason why the affidavit of the person or persons having knowledge of the facts alleged was not secured.'

"This contention cannot be sustained. The complaint alleges on information and belief that Beavers was an officer of the government of the United States in the office of the First Assistant

Postmaster General of the United States; that, as such officer, he was charged with the consideration of allowances for expenditures, and with the procuring of contracts with and from persons proposing to furnish supplies to the said Postoffice Department; that he made a fraudulent agreement with the Edward J. Brandt-Dent Company for the purchase of automatic cashiers for the Postoffice Department and received pay therefor; that an indictment had been found by the Grand Jury of the eastern district, a warrant issued and returned 'not found,' and that the defendant was within the southern district of New York. This complaint was supported by affidavit, in which it was said:

"'Deponent further says that the sources of his information are the official documents with reference to the making of the said contract and the said transactions on file in the records of the United States of America and in the Postoffice Department thereof and letters and communications from the Edward J. Brandt-Dent Company with reference to said contract, and from the indictment, a certified copy of which is referred to in said affidavit as Exhibit A, and the bench warrant therein referred to as Exhibit B, and from personal conversations with the parties who had the various transactions with the said George W. Beavers in relation thereto; and that his information as to the whereabouts of the said George W. Beavers is derived from a conversation had with the said George W. Beavers in said southern district of New York in the past few days, and from the certificate of the United States marshal for the eastern district of New York, indorsed on said warrant.'

"This disclosure of the sources of information was sufficient. In Rice vs. Ames, 180 U. S. 371, 45 L. Ed. 577, 21 Sup. Ct. Rep 406, a case of ex-

tradition to a foreign country, in which the complaint was made upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant."

We have made a painstaking examination of the authorities involving the sufficiency of affidavits and find none which holds that probable cause cannot be established upon information and belief when the information and its source is set out in the affidavit. The precise question which is presented to this Court for its decision is whether or not the facts set out in the affidavit herein quoted were sufficient in their allegations as to induce in the minds of a reasonable, cautious and prudent person, the belief or well-founded suspicion that there was intoxicating liquor upon the premises. This was the test laid down in the case of Wiley vs. State (Ariz.) 170 Pac. 869; 3d A. L. R., page 373, 376.

We also cite the case of Ocampo vs. the United States, page 58 Law Edition page 1231, wherein the Supreme Court of the United States held that, "The preliminary investigation conducted by the prosecuting attorney of the city of Manila and upon which he files a sworn information against the party accused, is sufficient compliance with the requirements of the constitution, to-wit: that no warrant was issued but upon probable cause supported by oath or

affirmation."

Probable cause, as defined by 32 Cyc. 402, is as follows:

> "Belief founded on reasonable grounds. That apparent state of facts found to exist upon reasonable inquiry. That is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe that the accused person in a criminal case had committed the crime charged."

In the case of Griswold vs. Griswold, 77 Pac., 672, probable cause was defined as the common standard of human judgment and conduct. In the case of State vs. Davie, 22NW, 411, it was held that probable cause does not mean actual and positive cause.

(2) **That under the facts as shown by the testimony, no search warrant was required.**

From a statement of the case it appears that the defendant was operating a soft-drink parlor and from the information set forth in the affidavit for search warrant, he was selling liquor from the kitchen. We have, therefore, a place of business where the public generally are invited.

From the testimony of Nash and Brown, no search was made of the premises and the jackass brandy and wine were under the table in the kitchen in plain sight.

Section 25, Title II of the National Prohibition Law, declares it to be unlawful to possess intoxicating liquor and further that no property rights shall exist in any such liquor.

Section 33 makes the possession of all liquor prima facia evidence that such liquor is kept for the pur-

pose of being sold, bartered, etc. Plaintiff in error, therefore, by having liquor in his possession was guilty of a violation of law. All the essential elements that make the offense were in plain view of officers.

It is elementary that a warrant for the arrest is not necessary where the crime is committed in the presence of an officer and further, if necessary, the officer making the arrest may seize the instruments which were used in the commission of the crime. Therefore, no search warrant was necessary for the seizure of the liquor found in plaintiff-in-error's saloon.

This Court, in the case of Benjamin, Catherine and James Sullivan vs. the United States, No. 3637, decided December 5th, 1921, held that a search warrant was not necessary for the search and seizure of intoxicating liquors and cited the case of Adams vs. the United States and Weeks vs. the United States.

In the case of the United States vs. Borkowski, 268 Federal, 408 (Montana), the Court held that the Federal Prohibition officers had a right to enter and search a house without a search warrant when it was ascertained by them through the sense of smell that intoxicating liquor was being manufactured upon the premises. This upon the theory that the officers had a right to arrest parties who committed a crime in their presence.

In the case of the United States vs. Murphy, 264 Federal, 842, it was determined by the Court that an officer had a right to search a person when making an arrest.

Judge Hand in the case of the United States vs.

Welch, 247 Fed. 239, sustained a search without a warrant, where the search was for the corpus of the crime and in this case Judge Hand distinguished the principle controlling in cases like the Weeks case and in cases where a search and seizure was made for the corpus of the crime, the Court said:

> His counsel argues that under the cases of Weeks vs. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A., 1915B, 834, Ann. Cas. 1915C 1177, and Flagg vs. United States, 233 Fed. 481, 147 C. C. A. 367, the evidence thus procured could not be used against the defendant. I do not think the government can rest upon the proposition that it was not liable for the acts of McGinnis, because he was a private detective. Martin, the custom house guard, appears to have asked him to act for him while he was temporarily absent, and in the search he must be regarded as a government official pro hac vice.
>
> But, assuming this to be the fact, the cases quoted do not apply to the present situation. They only go so far as to hold that private books and papers cannot be seized and used as incriminating evidence. The corpus delicti itself has not, I think, been held incapable of detention and production to establish the crime. If the defendant is right, testimony of a witness of a murder, though furnishing the only evidence, would be excluded, and the corpse could not be presented before the coroner's jury, if the witness discovered the murder by rushing into a house without a search warrant, where he heard cries of distress. Here the letter is in no real sense the property of of the defendant, but is the very unlawful thing imported contrary to the statute.
>
> I think the District Attorney is right in urging that any one could arrest the person carrying it.

who was thus committing a felony in his presence. To be sure, the man making the arrest did not know that a felony was being committed. He took the risk of civil and perhaps criminal actions for assault and battery if his suspicions turned out to be without foundation; but in this case it appears on the face of the indictment, and from the evidence adduced, that the suspicions were well founded, and the defendant was engaged in the commission of a felony. The constitutional safeguards against self-incrimination do not prevent the arrest of men engaged in the commission of crimes, or the seizure of property whereby the crime is being effected.

It is next contended by plaintiff in error:

(b) **That the lower Court erred in refusing to entertain the motion to review the action of the United States Commissioner in denying the motion to quash the search warrant.**

In answer to this contention it is respectfully urged that the District Court has no jurisdiction to review the action of the United States Commissioner in refusing to quash a search warrant. This for the reason that the United States Commissioner is an arm of the District Court and it will be just the same as asking the District Court to review its own decision.

(U. S. vs. Moresca, 266 Federal, 713).

It is also complained by Plaintiff in Error:

(c) **That the lower Court erred in denying the motion to quash the search warrant made as an original motion in the District Court.**

We respectfully submit, for the sake of argument, that this Court might hold that the affidavit upon

which the search warrant was issued was insufficient and that no right existed in the officers to search without a warrant and notwithstanding these findings this court would not be justified in reversing the case.

(1) That in all of the proceeding in the lower Court, up to the time of conviction, plaintiff in error made no showing that the guarantees given him by either the fourth or fifth Amendment to the Constitution of the United States were in any way violated in the seizure of intoxicating liquor upon the premises of the Alpine Winery. It is fundamental that the Court will not declare any proceedings, had with judicial sanction, void as infringing vested rights except at the instance of a party whose rights are violated or impaired. It will not consider the objection of one to the constitutionality of an act or proceeding by a party whose rights it does not affect and who has therefore no interest in defeating it.

(See Estate of Sticknoth, 7th Nev., 223;

State vs. Beck, 25th Nev. 68; 56 Pac. 1008).

So far as the record discloses the lower Court at no time was apprised by the plaintiff in error of the fact that his constitutional guarantees had been violated, it being simply presented to him in the form of an abstract principle of law. as the defendant made no claim or pretense at any stage of the hearing that the property seized was his or that the premises invaded were owned by him. In fact, that was the issue in the case as to the ownership of the liquor and of the premises. It was incumbent at all times upon the defendant in the Court below to show that

his constitutional rights were invaded and not those of some one else, who, so far as the court was concerned, may have been an absolute stranger to the proceedings. No showing, therefore, having been made by plaintiff in error that the officers took from him the intoxicating liquor, it must logically follow that it is not within his province now to complain that the seizure was unlawful.

It is next urged by Plaintiff in Error that the search warrant was illegal.

A reading of the transcript in this case establishes: That at no time in the lower Court did plaintiff in error urge that the search warrant in itself was insufficient. It was urged that the search warrant was insufficient because no valid affidavit was filed and this was the only objection urged in the lower Court to the sufficiency of the search warrant. We challenge counsel to point out to the Court any objection made by him in the lower Court attacking the sufficiency of the search warrant upon the grounds he now urges in this Court.

In conclusion we again invite the court's attention to the fact that the Plaintiff in Error was engaged in conducting a soft-drink parlor and that the record establishes without contradiction that the portion of the premises used as a kitchen was simply a blind for the sale of intoxicating liquors.

While every citizen is entitled to the rights and privileges given him under the constitution of the United States, it must become manifest to the ordinary man that the provision of the Constitution in reference to search warrants is being worked threadbare. It has been used as a smoke-screen to cover up and shield individuals who openly flaunt the

law in disposing of intoxicating liquors; when they are caught open-handed they have the audacity to come into Court and ask the Court to so construe the Constitution of the United States as to afford them protection; not only protection to them personally, but they request the Court to establish a doctrine which will declare immune from seizure the very corpus of the crime—the intoxicating liquor. We believe that the Constitution was framed, not for the benefit of the law-breaker, but for the protection of the innocent and the public.

We most earnestly urge that the judgment in this case should be affirmed.

Respectfully submitted,

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